

The Infant Life (Preservation) Act 1929: A case for reforming the law on foetal death due to third party recklessness

Introduction

The conundrum of how to regulate a foetus who is stillborn due to third party recklessness has perplexed both Parliament and the judiciary. Under the Infant Life (Preservation) Act 1929, the mens rea of intention must be proved by the prosecution for a defendant to be found guilty of child destruction. For instances where it cannot be proved, a stillbirth is categorised as a bodily injury to the mother which is argued to misrepresent the loss experienced by grieving families.

The domestic legal framework struggles to meet the challenges of both sides of the debate, reflecting a fundamental difficulty in recognising a foetus as a distinct entity in the law without restricting a woman's reproductive autonomy. A proposal for law reform must enshrine a woman's reproductive choice whilst being compatible within the existing legal framework.

This essay asks what the perspective of the grieving mother can bring to the debate in terms of helping the criminal law accurately come to grips with the complexity of pregnancy, the unique experience of stillbirth bereavement and the specific harm of foetal loss.

Both practical and academic challenges to the existing framework have been identified, relating to the infrequency by which the Infant Life (Preservation) Act is successfully charged and how the current legal framework which categorises the loss as maternal injury is incompatible with the lived experience of grieving families. In light of these limitations, this essay considers whether a law reform based upon the violation of a woman's bodily boundaries without her consent provides a more effective and practical solution to prosecute those who procure a stillbirth via reckless acts.

The Current Legal Framework

In English law, three statutes govern the foetal entity in utero. These are the Offences Against the Person Act 1861 (OAPA), the Abortion Act 1967 (AA) and the Infant Life (Preservation) Act 1929 (ILPA).

S.1 Infant Life (Preservation) Act 1929 makes it a criminal offence to 'by any wilful act causes a child to die before it has an existence independent of its mother', 'with intent to destroy the life of a child capable of being born alive' unless it is done 'in good faith for the purpose only of preserving the life of the mother'. If both the actus reus and mens rea of intent are proven by the prosecution, the defendant would be charged with child destruction and sentenced up to life imprisonment.

The statute was not intended to regulate abortions, but rather to close a 'legal lacuna' in the law.¹ Neither a murder charge nor the procurement of miscarriage was applicable when the death of a baby was caused whilst exiting the birth canal – the procurement of miscarriage only applies to the death of a foetus following induced labour and so labour that commenced naturally was not covered under the Act.² It was found that the lack of protection meant that those who committed homicidal violence against a newborn could claim that death occurred in the birth canal to avoid legal repercussions.³

One element of the offence of child destruction is the requirement for the foetus to be 'capable of being born alive'. To meet this requirement, the foetus must be at a stage of gestation whereby, if born, would be able to survive by 'breathing through its own lungs alone, without deriving any of its living or power of living by or through any connection with its mother'.⁴ S.1(2) further clarifies, detailing that a foetus must have reached the gestational period of 'twenty-eight weeks or more' to be capable of being born alive. It is at this point that the foetus is now protected under the Act in law. Nevertheless with medical

¹ Marc Stauch and Kay Wheat, *Text, Cases and Materials on Medical Law and Ethics*, 5th edn (Routledge 2015), 391.

² Sally Sheldon, 'The Decriminalisation of Abortion: an Argument for Modernisation' (2015) 36 *Oxford Journal of Legal Studies* 334, 340; Emma Milne, 'Suspicious perinatal death and the law: criminalising mothers who do not conform' (2017) PhD Thesis, University of Essex, 108.

³ *Ibid*

⁴ *Rance v Mid-Downs Health Authority*, per Brooke J, 621.

advances, it is likely that a foetus that reaches the gestational period of twenty-four weeks would now be recognised under the offence of child destruction.⁵

The Legal Significance of Birth

The debate over the protection of a foetus in utero tends to accentuate two different questions. Firstly, it is the discussion about whether a foetus has 'rights', either sui generis or of that of a born human, and therefore whether they are entitled to legal protection because of those rights.⁶

A legal person is one that is recognised by a legal system. If a human being is granted a legal personality, then they are subject to the 'bundles of rights and is able to move through the dimensions of law, exercise rights, appear before the court and operate as a legal actor'.⁷

This includes a right to life under Article 2 of the European Convention of Human Rights (ECHR) and equal treatment under the law.

The traditional position of the English Court is that the law has differentiated the status of an unborn foetus to that of a child who has been born.⁸ The phenomenon of birth has classically been the demarcation point for when a foetus becomes a child and acquires full legal personhood.⁹ Until this arbitrary point, unborn children (whether that be a foetus at any point of gestation or embryo) are unable to exercise their legal rights or be the victim of crime under the criminal or civil law.¹⁰ It is when the child is living independently of the mother where they accrue a legal personality and can become a victim of a homicide offence. It is therefore in cases of third-party acts against pregnant women resulting in

⁵ Bethane Harland, 'Great Misprision, And No Murder': Reforming The Offence Of Child Destruction' (2019) 1. 139-168

⁶ Mona Aryan, 'Foetal Abuse From A Legal And An Ethical Standpoint: An Investigation Into The Extent To Which The Law Could Be Changed So That Unborn Children Could Be Better Protected From Harm' (Master of Arts, King's College London 2019).

⁷ Stewart C, "Legal Constructions of Life and Death in the Common Law" (2002) 2 OUCIJ 67 at 68.

⁸ Ian Freckelton, 'Stillbirth And The Law: Options For Law Reform And Issues For The Coronial Jurisdiction' (2013). 21 JLM. 7

⁹ Ibid

¹⁰ R v Hutty [1953] VLR 338 at 339

foetal death where the born alive rule, by which one must be born alive to acquire protected rights, is classically held as the 'key obstacle to legal redress'.¹¹

The basic rule of the common law is that to be a victim of a criminal offence, one must be 'a reasonable creature, in rerum natura' – 'a reasonable creature in being'.¹² This rule was formulated by Coke in 1797 in the context of murder and has since been interpreted in a court of law over time.¹³

In Attorney- General's Reference (No 3 of 1994)¹⁴, the House of Lords was asked to determine whether a foetus, injured in a stabbing at 22-24 weeks of gestation (whereby independent survival outside the womb was unlikely) could be a victim of murder or manslaughter if it was born prematurely and then later passed away.

However, whilst the Court did not recognise that that violence to a foetus in utero was a crime against a person, it rather determined that a foetus was 'an organism sui generis'.¹⁵ Through the physical reality of pregnancy, the foetus does not have a separate existence from the mother, but it is nonetheless a human, and the gestational period represents a unique bond between mother and foetus.¹⁶ For a third party to interfere with the continuance of a pregnancy is a distinct harm that goes beyond any mere injury to the woman.¹⁷ Hence, it is Lord Mustill who identifies the foetus as a 'unique organism'¹⁸, illustrating that although not expressed in statute, the entity of a foetus is one that is ethically contentious and incomparable.

¹¹ Stringer R, "Fact, Fiction and the Fetus: Violence against Pregnant Women and the Politics of Abortion" (2006) 25 Australian Feminist Law Journal 99 at 111; Seymour J, *Childbirth and the Law* (Oxford University Press, 2000) 189

¹² Nicola Monaghan, *Criminal Law Directions* (3rd edn, Oxford University Press 2014) 98.

¹³ Edward Coke, *The Third Part of the Institute of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (E&R Brooke 1797) 47.

¹⁴ Attorney General's Reference (No 3 of 1994) [1998] AC 245

¹⁵ *Ibid* [255]-[256]

¹⁶ Sheena Meredith, *Policing Pregnancy : The Law And Ethics Of Obstetric Conflict* (Florence: Taylor and Francis 2005).

¹⁷ Hannah Robert, 'The Bereavement Gap: Grief, Human Dignity And Legal Personhood In The Debate Over Zoe 'S Law' (2014) 22 *Journal of Law and Medicine*.319

¹⁸ AG's Reference (No 3 of 1994) [1997] 3 All ER 936.

Why is the ILPA Problematic?

Upon examination of the existing legal framework, I argue that it is too difficult for the prosecution to prove the requisite intention to satisfy the mens rea component of the offence of child destruction, therefore making it too easy for defendants to escape liability for death of a foetus in utero. It can be difficult to prove whether someone intended to kill an entity which cannot be seen by the human eye, especially when visible harm can be seen to be inflicted upon the mother.¹⁹

It is this difficulty to successfully prosecute a defendant for child destruction that renders the ILPA in its current form redundant. Fewer than 5 prosecutions are brought under the ILPA every year²⁰ and in conjunction with zero prosecutions ever being brought for the original purpose of the Act²¹, these numbers contribute to the justification for ILPA reform. Although the ILPA has found a contemporary niche in becoming an offence used to prosecute those who intend to end the life of a foetus mainly within situations of domestic violence²², those defendants who in the opinion of the jury, do not possess the mens rea of intention find themselves outside the realms of the ILPA with currently no alternative charge to be prosecuted under in respect to the life of the foetus.

The 'born alive' rule provides the law with a clear demarcation point, dictating the point as to when a foetus is protected through the rights of the mother until it becomes a separate entity itself out of the womb. The enhanced legal protection of an entity outside the womb is in stark contrast with the lack of protection pre-birth, but this does not mean that a foetus should be completely disregarded.²³ It can be argued that their interests in future live existence are great²⁴ even if they are not classed as 'legal persons', and for the law in most instances to categorise this loss as purely an injury to the mother fails to capture both the grief of the family and the unique relationship between mother and foetus.

¹⁹ See n.5

²⁰ Office for National Statistics, Crime in England and Wales: Year Ending June 2018, Table A4 <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/datasets/crimeinenglandandwales/appendixtables>> accessed 24th June 2022

²¹ See n.2. 341

²² See n.5

²³ Christopher Nobbs, 'Probability Potentiality' (2007) 16 Cambridge Quarterly of Healthcare Ethics 240, Ch 1

²⁴ Ibid

Evaluating the Foetus: A Maternal Injury or a Separate Legal Entity?

The current legal approach is at odds with grieving families by mandating that the prosecution must prove that a defendant showed intention. The difficulty of a successful prosecution under the ILPA results in the stillbirth of a foetus due to reckless acts being described as an injury to the mother herself and fails to recognise the foetal entity having ever existed under the current legislative framework. The single-entity model in recognising a foetus as purely an extension of the mother fails to capture the unique situation of pregnancy in which a foetus is 'neither a distinct person separate from its mother nor merely an adjunct of the mother'.²⁵ The model treats the woman as the only subject of harm and so any injury that a foetus may sustain or death in utero is categorised as a maternal injury.²⁶ It is how the law has historically handled the entity of the foetus which has been regarded as 'simply part of the woman's body.'²⁷

The Separate Entities Model

In contrast, the separate entities model assumes that a foetus has a completely separate existence from the mother. This model treats the mother and the foetus as distinct separate and legal entities, each with their own bundles of rights and obligations.²⁸ However, the physical reality of pregnancy is one which is incompatible with this model. A pregnant woman and foetus, whilst having a distinct genetic makeup, both share the same external physical boundary.²⁹ Any injury to the foetal entity itself must naturally violate the physical boundaries of the mother, making it a practical impossibility for a foetus to make a claim

²⁵ Attorney General's Reference (No 3 of 1994) [1998] AC 245

²⁶ Stringer R, "Fact, Fiction and the Fetus: Violence against Pregnant Women and the Politics of Abortion" (2006) 25 Australian Feminist Law Journal 99 at 111; Seymour J, *Childbirth and the Law* (Oxford University Press, 2000) 189

²⁷ John Seymour, *Childbirth And The Law* (Oxford University Press 2000).

²⁸ See n.17

²⁹ Ibid

against a transgressor in a court of law but with no claim being made against the mother herself.³⁰

However, as much as a separate entity model-based law reform would recognise the foetus within the criminal law, it has the potential to conflict with existing legislation. Previous attempts in international legal spheres to address this conflict have, amongst others, included the creation of a separate charge that explicitly recognised a 'child in utero'³¹ or by expanding the definition of what is considered a 'legal person'³². In both cases, this would serve to recognise the foetus as a separate entity, but the creation of a law that mimics the separate entities model can be catastrophic for a woman's ability to exercise her bodily autonomy.

The Not-One-But-Not-Two Model of Pregnancy

Where both the single and dual entity models of pregnancy have failed to appreciate the unique reality of the relationship between the pregnant woman and her foetus, the 'not-one-but-not-two' model³³ endeavours to capture the complexity of pregnancy and is academic reasoning to what the courts describe an 'organism sui generis'.³⁴ It is a model that can capture the unique situation of pregnancy whereby there is a development of a distinct entity inside another, but also whereby any action that is taken to the foetus is simultaneously an action to the mother's own body. Using this model, it is said that 'the woman's body is seen as neither container nor separate entity from the fetus. Until the baby is born the fetus is the female body. It is part of her body/self.'³⁵

The Case for Law Reform

³⁰ As occurred in *Flores v State* 245 SW 3d 432 at 442 (Tex Crim App, 2008) under the Prenatal Protection Act, 822 Tex Code Ann § 1.01.

³¹ Unborn Victims of Violence Act 2004 (18 United States Code) s 1841

³² Crimes Amendment (Zoe's Law) Bill 2013 (No 2) (NSW).

³³ Karpin, I. (1992). Legislating the Female Body: Reproductive Technology and the Reconstructed Woman. *Columbia Journal of Gender and Law*, 3(1), 325–350.

³⁴ See n.25 [255]-[256]

³⁵ See n.33

It is therefore the case that a well-suited proposal for law reform must be framed in a way that recognises the unique harm of foetal loss. Creating a charge around the violation of a woman's bodily boundaries will serve to protect and advocate for the embodied integrity of the woman whilst also recognising the foetal entity without the introduction of a legal personality. A law that frames forced pregnancy loss as an offence in its own right could both protect a woman's existing reproductive autonomy whilst more accurately reflecting the complex status of the foetus within English society.

Under this proposed reform, the mother would remain the legal decision maker until the foetus gains a separate legal personhood at live birth, but still acknowledges the presence of a separate entity that was living within the mother's bodily boundaries. Irrespective of questions posed around the foetal entity, 'to deprive a woman of her future child cannot be seen as anything less than a gross insult to her bodily integrity'³⁶, and so creating an offence with a woman's reproductive autonomy at the helm should both recognise the foetal entity whilst also helping to validate the grief experienced due to foetal loss.

Solution 1

One potential solution would be to extend the existing offence of child destruction to include the mens rea of recklessness.³⁷ Objectively, the mens rea for recklessness is one that is easier for the prosecution to prove and so by widening the realms of the mens rea, it would encapsulate those who cause a stillbirth by reckless acts.

Solution 2

However, another solution would be the creation of a separate, lesser charge distinct from that of the existing offence of child destruction that is centred around the violation of a

³⁶ See n.17

³⁷ See n.5

woman's bodily boundaries. This solution would recognise pregnancy loss as a distinct harm.³⁸

To allow compatibility within existing legislation, the proposed law reform would contain a provision to only allow a foetus which has surpassed the 24th week of gestation to be included with the law reform. Although a foetus has developed enough at 22 weeks gestation to be able to live independently of the mother, albeit the chances of prolonged survival are still minimal, the viability threshold would be set at 24 weeks gestation to not interfere with the Abortion Act 1967.

The offence committed can only be committed against a pregnant woman – reflecting a law founded upon the not-one-but-not-two model and demonstrates the 'uniqueness of the pregnant state'.³⁹ An approach that advocates for the embodied integrity of the woman should create an offence that recognises both the loss of a wanted pregnancy, the wrongfulness of preventing a foetus from becoming a legal person, and the loss of the foetus in and of itself whilst deep rooting a woman's reproductive autonomy within legislation.

Such an approach advocates for the embodied integrity of the woman whilst directly addressing a woman's freedom from the interference of others in a wanted pregnancy. It treats the harm as a violation of the mother's reproductive autonomy instead of founded upon the foetus being regarded as a 'legal person' and therefore having a right to life. Clearly, a foetus is a biological entity; however it is different from a born child, in that it is an entity exclusively dependant on the woman's body for its continued existence. It is a potential human -in-being, albeit not an actual one as the woman carrying the foetus is to become a mother.⁴⁰ For someone, through reckless behaviour, to terminate a viable pregnancy without the woman's consent causes tremendous grief to families, and so it is the hope that by recognising a foetal entity through a woman's reproductive rights can help to deliver justice.

³⁸ See n.17

³⁹ See n.17

⁴⁰ Sheena Meredith, *Policing Pregnancy : The Law And Ethics Of Obstetric Conflict* (Florence: Taylor and Francis 2005).

Concluding Thoughts

This essay has argued that the current legislative framework currently does not adequately address the loss experienced by grieving mothers whose pregnancy resulted in stillbirth due to third party recklessness. The prerequisite of intention to allow a defendant to be charged with child destruction has created a lacuna in the law whereby for most where the mens rea of intent cannot be proved, the only crime recognised in a court of law does not go beyond the personal attack to the mother's body. The relationship between mother and foetus is one unlike any other, and thus it is not surprising that the law has struggled to come to terms with the 'uniqueness of the pregnant state'.⁴¹ Whilst recognising that the ILPA has proved useful in prosecuting those proven to show intention, I argue that the legislative framework is inadequate and fails to represent the unique loss that women face when a foetus is stillborn due to reckless acts.

The proposed statutory provision would find the right balance between recognising the foetal entity in the criminal law whilst also respecting female reproductive rights. Law reform is required to close the lacuna in existing legislation and should acknowledge that for some grieving mothers, stillbirth is 'something of intrinsic value had been lost'.⁴² I therefore argue that a law reform encapsulating the unique concept of pregnancy and enshrining female reproductive rights poses the most effective answer.

⁴¹ See n.17

⁴² Camilla Pickles, 'The Introduction of a Statutory Crime to Address Third-Party Foetal Violence' (2011) 74 THRHR 546